

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-13883 ORIGINAL

Bp/s

In The
United States Court of Appeals
For The Second Circuit

SALVATORE ALBANESE,

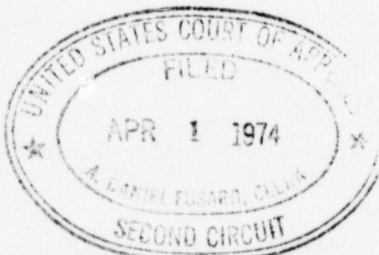
Petitioner-Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPELLANT'S APPENDIX



H. ELLIOT WALES
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747 Third Avenue
New York, New York 10017
(212) 421-1993

JEROME LEWIS
On the Brief

(7051)

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"11" Q "

A

D. C. 106

730 1789

DOCKET ENTRIES

SEC. 2255

MOORE, J.

DOCKET

TITLE OF CASE

UNITED STATES OF AMERICA

vs.

SALVATORE ALBANESE

ATTORNEYS

For Plaintiff: ROBERT A. MORSE

U.S. ATTY.

For Defendant: H. ELLIOT WAI

ESQ.

747 Third Ave. N.Y.

Tel: 421-1993

BASIS OF ACTION:

(Related Case 60-CR-147)

JURY TRIAL CLAIMED

ON

[illegible]

ABSTRACT OF COSTS

TO WHOM DUE

AMOUNT

RECEIPTS, REMARKS, ETC.

"B"

Docket Entries

E

[illegible]

60 CR 14A

UNITED STATES DISTRICT
COURT: EASTERN DISTRICT OF
NEW YORK

UNITED STATES OF AMERICA,

- against -

SALVATORE ALBANESE,

Defendant.

#18.00

NOTICE OF MOTION FOR CREDIT
TOWARD THE SENTENCE
IMPOSED OF PRETRIAL CON-
FINEMENT TIME

LAW OFFICES
H. ELLIOT WALES
XXXXXXXXXXXX747 Third
NEW YORK, N.Y. XXXXXX Ave.
10017

730 1739

Order

December 4, 1973

After hearing, for the reasons and
on the grounds stated at the hearing,
it is,

Ordered that the motion is in
all respects denied.

Brooklyn, New York

Plaintiff
J.S.D.

ORDER - ENDORSED ON MOTION PAPERS
(Filed December 4, 1973)

NOTICE OF APPEAL (Filed December 7, 1973)

2a

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA, :
 : Docket #73 C 1789
 - against - :
 :
 SALVATORE ALBANESE, : NOTICE OF APPEAL
 :
 Defendant. :
-----X

S I R:

PLEASE TAKE NOTICE that the defendant SALVATORE ALBANESE hereby appeals to the United States Court of Appeals from the order of the United States District Court, dated December 4, 1973, denying his motion for jail time credit toward the service of the sentence.

Yours, etc.,

Dated: New York, N.Y.
December 7, 1973

H. ELLIOT WALES
Counsel for Defendant
Albanese
747 Third Avenue
New York, N.Y. 10017
421-1993

To: CLERK OF THE COURT

UNITED STATES ATTORNEY

NOTICE OF MOTION AND SUPPORTING AFFIDAVIT OF COUNSEL 3a
UNITED STATES DISTRICT COURT (Filed December 7, 1973)
EASTERN DISTRICT OF NEW YORK

----- X
UNITED STATES OF AMERICA, :
 : 73 Civil 1789
 : ~~60 GR 147~~
 - against - : (JFD)
 :
 SALVATORE ALBANESE, : NOTICE OF MOTION FOR
 : CREDIT TOWARD THE SENTENCE
 Defendant. : IMPOSED OF PRETRIAL CON-
 : FINEMENT TIME
----- X

S I R:

PLEASE TAKE NOTICE that upon the judgment of conviction and sentence, dated June 6, 1969, upon the transcript of proceedings of the sentencing of that day, upon the annexed affidavit of H. ELLIOT WALES, and upon the supporting letters from the United States Bureau of Prisons, the undersigned will apply to this Court, before District Judge John F. Dooling, Jr., on the 4th day of December, 1973, at such date and time as he shall set forth, for an order, pursuant to 28 USC 2255, 18 USC 3568, and 18 USC 3651, directing that the defendant be given credit for the pretrial period of confinement (March 7, 1960 to May 20, 1963 - three years, 2 months, 13 days - 1170 days) toward the sentence of five years probation which this Court imposed on June 6, 1969, and which defendant began to serve on January 18, 1972.

Dated: New York, N.Y.
November 30, 1973

TO: CLERK OF THE COURT

UNITED STATES ATTORNEY

UNITED STATES PROBATION OFFICE

Yours, etc.,
H. Elliot Wales
H. ELLIOT WALES
Counsel for Defendant
747 Third Avenue
New York, N.Y. 10017
421-1993

Notice of Motion and Supporting Affidavit of Counsel
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

4a

-----X

UNITED STATES OF AMERICA, :

- against -

60 CR 147
(JFD)

SALVATORE ALBANESE, :

Defendant. :

COUNSEL'S AFFIDAVIT IN
SUPPORT OF APPLICATION

-----X

STATE OF NEW YORK)

) SS.:

COUNTY OF NEW YORK)

H. ELLIOT WALES, being duly sworn, deposes and says:

I am counsel for the defendant SALVATORE ALBANESE, and submit this affidavit, together with the supporting documents, in support of his application for credit for time served toward the sentence of probation imposed by this Court on June 6, 1969.

Perhaps this Court will recall that Albanese was one of the defendants in the renowned Persico case, of which the fifth trial was presided by Your Honor.

On June 6, 1969 this Court imposed a sentence of probation in the term of five years upon Albanese. Simultaneously the Court imposed a ten year prison sentence upon him, but suspended the execution of that sentence.

In 1970 the Court of Appeals affirmed the conviction (425 F2d 1375), and later that year the Supreme Court denied certiorari. 400 US 869.

Notice of Motion and Supporting Affidavit of Counsel

5a

Albanese began service of the sentence of probation on January 18, 1972. According to the records of the Probation Department, he must remain under supervision until January 18, 1977, when the five year probation period expires. Albanese has already served more than one year and ten months of that sentence. It is his position that he is entitled to credit for pretrial confinement for a period of three years, two months, and thirteen days. If he is given credit for that time toward his sentence, he will then have served the entire five year sentence, and would be entitled to discharge at this point.

The attached letters from the United States Bureau of Prisons (Federal House of Detention, New York City and of the Penitentiary at Atlanta, Georgia) show that Albanese was confined continuously with regard to this matter from March 7, 1960 until May 20, 1963 - a period of three years, two months, thirteen days - or 1170 days. The record shows Albanese was arrested on March 7, 1960, and held continuously at the Federal Detention Headquarters at West Street until November 14, 1961 when he was transferred to the Penitentiary at Atlanta, Georgia for service of the sentence which had been imposed upon him on October 31, 1961 by the late Judge Abruzzo. Subsequently Albanese was returned to West Street from Atlanta on October 3, 1962, and he remained at West Street until May 20, 1963, when he was released from federal custody.

In imposing sentence this Court stated (R. 57):

"THE COURT: It is my intention to impose and suspend the execution of the sentence of imprisonment and accord you the maximum probation term. I understand your State probation is now over.

Notice of Motion and Supporting Affidavit of Counsel

6a

MR. ALBANESE: Yes, your Honor.

THE COURT: On the jury's verdict of guilty to Counts 1 and 2 of the Indictment, you, Salvatore Albanese, are committed to the Attorney General or his duly authorized representative who shall designate the place of confinement for ten years. Execution of the sentence is suspended and you are placed on probation for five years under the conditions provided by the standing Order of the Court."

In imposing sentence, this Court did not state that it was giving Albanese credit for the period of pretrial confinement. In fact the Court was very firm in declaring that it was imposing the maximum probation term.

In contrast, in imposing sentence upon co-defendant Hugh McIntosh, this Court stated specifically that under Section 3568, it was intending that McIntosh should have credit against his sentence for the time spent in pretrial confinement (R. 52):

" THE COURT: That, under Section 3568 is, as I understand the law, a credit against the sentence, and it is so intended."

To be sure this Court did discuss with counsel the period of time which Albanese did spend in federal custody in lieu of bail and in State custody for service of a prison sentence (R.55-56):

"THE COURT: Since the commission of this offense, you have served a term of imprisonment and have been released on parole?

MR. ALBANESE: Yes.

THE COURT: Has that parole been completed?

MR. ALBANESE: Yes, your Honor.

THE COURT: And in this case, you had been held for want of bail?

MR. ALBANESE: Yes, your Honor.

THE COURT: As I recall, for a substantial period.

MR. ALBANESE: Yes, your Honor.

THE COURT: Over three years?

MR. ALBANESE: Yes, sir.

THE COURT: Mr. Albanese, is there any reason, any just cause, why sentence should not be imposed?

MR. ALBANESE: No, your Honor.

THE COURT: Is there anything you wish to say on your own behalf with respect to sentence?

MR. ALBANESE: No, just that I did another three years extra on my State case because of this.

THE COURT: This was treated as a parole violation?

MR. ALBANESE: Yes, your Honor. I was supposed to finish up in '63 and I didn't finish up until '67.

THE COURT: And all of this since 1960?

MR. ALBANESE: Yes.

THE COURT: It is my intention to impose and suspend the execution of the sentence of imprisonment and accord you the maximum probation term. I understand your State probation is now over.

MR. ALBANESE: Yes, your Honor.

THE COURT: On the jury's verdict of guilty to Counts 1 and 2 of the Indictment, you, Salvatore Albanese, are committed to the Attorney General or his duly authorized representative who shall designate the place of confinement for ten years. Execution of the sentence is suspended and you are placed on probation for five years under the conditions provided by the standing Order of the court."

On the other hand the Court never did state that it was giving Albanese credit for such time. In fact if the Court really wished the credit provision of 18 USC 3568 to be applicable, this Court could have imposed a prison sentence of almost four years on count 1, and limited the sentence of pro-

bation to count 2. In that event Section 3568 would have given Albanese the necessary credit so that he would not have had to serve a day toward an imposed sentence of almost four years.

It is our position that Albanese is entitled to credit of 1170 days toward the only sentence of "custody" imposed - the five year probation sentence. As five years is the maximum probation period which can be imposed, it cannot be presumed that the District Court gave him credit toward that sentence of probation for his pretrial confinement period. 18 USC 3651. Actually Section 3568 Title 18, U.S. Code, is ambiguous, and doesn't fully answer the issue posed. While the section states that the Attorney General shall give credit for any days spent in custody in connection with the offense for which sentence was imposed, the section states that the credit shall be given "toward service of his sentence". The section does not state whether it is applicable only to a prison sentence, or whether it equally applies to a sentence of probation. Likewise the legislative history sheds no light at all on this subject. See Bail Reform Act of 1966, especially section 4 of that act, referred to, but not discussed at 1966 US Code Congressional and Administrative News, pages 2293, 2294, 2297, 2306, 2310.

In addition none of the reported court opinions discusses this very problem.

The record shows that for several reasons (either articulated or not articulated), the District Court did not wish to impose a sentence of imprisonment upon Albanese. Perhaps the Court was motivated by the age of the case, or perhaps by the lesser culpability of the defendant. Perhaps

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the Court was influenced by the fact that Albanese had since served a State prison sentence for the very same transgression. In any event, the Court clearly did not want to see Albanese returned to prison. On the other hand the Court's decision just could not erase the effect of section 3568, nor can it easily wipe out the total of 1170 days which Albanese served in federal institutions. There just is no reason in policy or law why only a person actually in prison should get credit for time served, and a person on probation should not be so credited. Actually a sentence of probation involves the element of "custody" - the probation is under the continuous supervision of the Probation Department, and must account to the Probation Department and to the District Court for any transgressions. He is subject to having his probation revoked, and a prison sentence imposed, for the violation of any terms and conditions of probation. Furthermore he is strictly accountable to the Probation Office for all his acts, and is prohibited from doing many things which are open to those who are not on probation. As such the Courts have uniformly considered a sentence of probation as one involving some degree of "custody". As such it is appropriate that Albanese receive credit for his pre-sentence confinement toward this sentence of custody which the Court imposed. As the Court imposed the maximum permissible sentence of probation, it cannot be urged that the Court took into consideration the earlier period of confinement, and subtracted it from the period of probation imposed. Nor does the record support the argument that the District Court gave Albanese credit towards a sentence of imprisonment which it would have imposed, but did not impose. Obviously the Court did not suspend the execution of the ten year prison sentence because of Albanese's pretrial confinement.

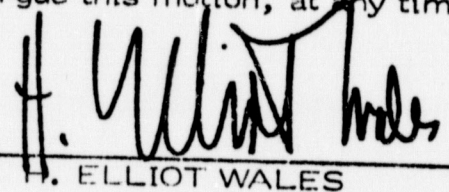
Notice of Motion and Supporting Affidavit of Counsel 10a

Certainly the Court did not intend to give him ten years credit for three years confinement. Furthermore the Court did not seem particularly concerned about the exact number of years or months which Albanese served—either in federal or state institutions.

The record clearly shows that the District Court did not wish to impose a sentence of imprisonment, and so was not concerned with the details of any other confinement. As such Albanese is entitled to credit toward the only sentence imposed — the one of probation.

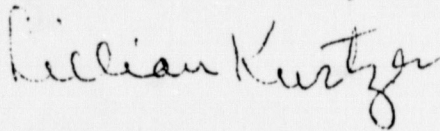
I submit the entire transcript of all the defendants that day (68 pages), but remind the Court that I have alerted it to the only relevant pages.

I request the opportunity to orally argue this motion, at any time convenient to the Court.


H. ELLIOT WALES

Sworn to before me this

30th day of November, 1973



LILLIAN KURTZER
COMMISSIONER OF DEEDS
CITY OF NEW YORK NO. 4-632
Certificate Filed in New York County
Commission Expires December 1, 1974

W
TRANSCRIPT OF ORAL ARGUMENT DECEMBER 4, 1973
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

11a

-----x
UNITED STATES OF AMERICA :

-against- :

SALVATORE ALBANESE, :

60-CR147

Defendant. :

-----x
United States Courthouse
Brooklyn, New York

December 4, 1973

Before :

HONORABLE JOHN F. DOOLING, JR., U.S.D.J.

EMANUEL KARR
OFFICIAL COURT REPORTER

1
2 **Appearances:**

3 ROBERT A. MORSE, ESQ.
4 United States Attorney
for the Eastern District of New York

5 BY: JAMES DOUGHERTY, ESQ.
6 Assistant United States Attorney

7 H. ELLIOT WALES, ESQ.
8 Attorney for Defendant

9 - - -
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1
2 THE CLERK: United States of America vs.
3 Salvatore Albanese, defendant, Motion for
4 Credit Towards the Sentence.

5 THE COURT: Now, do you want to explain
6 it for the record, for me and for Mr. Dougherty?

7 MR. WALES: I assume your Honor read
8 the papers.

9 THE COURT: Oh, yes.

10 MR. WALES: Very good.

11 This is an application for the Court to
12 allow credit of approximately three years, two
13 months, in other words, 1170 days of actual pre-
14 trial confinement towards the sentence of five
15 years of probation which the Court did impose.
16 The Court imposed the sentence in 1969 of five
17 years probation, and Mr. Albanese began service
18 of that sentence approximately one year and
19 almost 11 months ago, it was in January of 1972,
20 according to the Probation Department records.
21 He has a five-year period of probation which
22 goes from January '72 to January '77. Obviously,
23 we cannot expect the Probation Department to make
24 the decision in this matter, so of course we have
25 to come before you, Judge Dooling, the sentencing

1
2 judge, for the question of credit for the time.

3 If our position is correct, then he has
4 served the sentence in toto and would be entitled
5 to a discharge, and so our application is in
6 the nature of a 2255 asking for his --

7 THE COURT: Or it is an application in
8 the nature of a writ of habeus corpus to discharge
9 him from the symbols of custody implicit in
10 probation.

11 MR. WALES: Well, we will say it is more
12 than symbols, your Honor, and I think that will
13 be an aspect of the argument.

14 Anyway, we asking the Court to give him
15 credit for it in such that he would --

16 THE COURT: What I am concerned with,
17 Mr. Wales, is the question of jurisdiction here
18 and whether technically Mr. Albanese should not
19 be the respondent to a writ or something of that
20 sort. That is all I was concerned about.

21 MR. WALES: Of course, I served the papers
22 upon the United States Probation Office, and I
23 should say I spoke to Steve Rachmil when I was
24 first retained to first of all find out certain
25 facts in terms of when he was due, when he

1 started probation, when it was expired. Mr. Rachmil
2 was aware of the fact that I was making this
3 application, Albanese had told him, and Mr.
4 Rachmil said, of course as I expected him to say,
5 "Well, obviously, we can't take a position on
6 it, whatever Judge Dooling says, we will abide
7 by. Of course, we are not making any determina-
8 tion, our records show that he is going to be
9 under our supervision until January '77, and
10 he will be, unless some Court directs otherwise,
11 which of course is a fair presentation of his
12 picture.
13

14 So I think there is nothing that Mr. Rachmil
15 and his office can do.

16 Obviously, we can only refer it to your
17 Honor, and since your Honor is here in the
18 same building, I don't think it presents any
19 undue administrative problem.

20 THE COURT: No administrative, just
21 technical problems.

22 MR. WALES: I think the Probation Office
23 is the agent and arm of the Court in terms of
24 supervising of men; obviously, judges themselves
25 aren't going to supervise men on probation,

1
2 for that they have a probation staff to do that
3 particular work and to report to them if there
4 are any problems and go to them for any Court
5 Orders in a case involving revocation.

6 THE COURT: You see, if I understand
7 the position that you take, when Mr. Albanese
8 appeared for sentencing in 1969 he was asked and
9 answered for present purposes truthfully that
10 he had already served some three years on any
11 time that might be imposed, that he had been
12 custody for want of bail on the charge then
13 before the Court for over three years, and I was
14 informed also and knew from the supplement to
15 the pre-sentence report that after he was released
16 from custody on bail in the Persico case he was
17 violated under State law and remitted until
18 either his mandatory parole expiration date or
19 until re-paroled, and that on sentence day he
20 had either completed or was still under State
21 parole supervision -- I think the latter, I am
22 not sure; but that appears in the transcript
23 because he was aware of it, and I know that
24 Spero was under parole supervision -- I can't
25 remember as to Mr. Albanese, perhaps he had
completed.

1
2 MR. WALES: I believe he did.

3 I don't believe there is anything in the
4 transcript on that score.

5 THE COURT: No, except the negative, I
6 mean it is sort of negative on the point, but
7 the fact is that he must have completed it
8 because it was a rather old sentence, as I recall.

9 Now, the sentence imposed was a sentence
10 of 10 years under Section 1951, where the maximum
11 is 20 years, and on the expiration or execution
12 of that sentence the placing of the man on parole
13 for five years, which is the maximum period of
14 parole permitted by Section 3651.

15 Now, certainly it was my intention, if
16 lawful, that he should be under probationary
17 supervision for the whole of the five-year period.
18 The thought of the sentence was that he would
19 after the date of the commission of the offense
20 serve a healthy amount of time in prison, more
21 than a third of any sentence -- well, no, but
22 creeping up on the third of almost any sentence
23 which you could think of was appropriate for
24 him. He had a record as a second offender and
25 I at least thought that he stood in need of

1
2 supervision, having in mind particularly that
3 this would help Mr. Albanese get out of the ugly
4 little circle of perhaps which he had been in
5 since 1959, and be out of it altogether. So
6 that is what I had in mind.

7 Now, if I understand your contention here
8 is that the sentence that was imposed and did not
9 suspend is really a commitment, it is a commit-
10 ment to the Eastern District of New York, let
11 us say, under Governmental supervision, and he
12 is therefore just as much entitled to a credit
13 as in any other kind of commitment -- right?

14 MR. WALES: Right.

15 THE COURT: I had never thought of that
16 before and I don't know that there are any authori-
17 ties on it, but I have a sneaking suspicion
18 that there are none because I know of your
19 diligence --

20 MR. WALES: Thank you.

21 THE COURT: (Continuing) -- and if there
22 had been one I would have expected to hear about
23 it in solid capitals, right?

24 MR. WALES: Thank you, I appreciate that.

25 THE COURT: So where are we?

1
2 Well, I suppose strictly we are under
3 3651, the first sentence of which -- and I
4 think it is for us the critical one -- reads:

5 "Upon entering a judgment of conviction
6 of any offense not punishable by death or life
7 imprisonment, any court having jurisdiction to
8 try offenses against the United States when satis-
9 fied that the ends of justice and the best
10 interests of the public as well as the defendant
11 will be served thereby may suspend the imposition
12 or execution of sentence and place the defendant
13 on probation for such period and upon such terms
14 and conditions as the Court deems best."

15 Then there is another sentence that is
16 very important:

17 * * *

18 "The period of probation, together with
19 any sentencing thereof, shall not exceed five
20 years."

21 Now, I think that is the section we have
22 to deal with.

23 Now, my own sense of it is this, that
24 since probation -- oh, wait, we probably should
25 look at 3658 together -- 3568, I'm sorry.

1
2 MR. WALES: 3568, right.

3 THE COURT: 3568 provides: "The sentence
4 of imprisonment of any person convicted of an
5 offense shall commence to run from the date on
6 which such person is received at a penitentiary,
7 reformatory or jail for service of such sentence."

8 Now, there is another sentence, the next
9 sentence: "The Attorney General shall give any
10 such person credit towards the service of his
11 sentence for any days spent in custody in connec-
12 tion with the offense or acts for which sentence
13 was imposed."

14 Now, I don't think the definitions count --
15 well, the following paragraph has a phrasing in
16 it which covers part of the time served:

17 If any such person shall be committed to
18 jail or other place of detention to await trans-
19 portation to the place of which his sentence is
20 to be served, his sentence shall commence to
21 run from the date on which he is received at
22 such jail or other place of detention."

23 Then it says in a separate paragraph:

24 "No sentence shall prescribe any other
25 method of computing the term."

1
2 Now, I think those are the sections that
3 we have to deal with.

4 Now, my sense of it is this, that Mr.
5 Albanese has a suspended sentence of ten years
6 overhanging him or did have because of course
7 if his probation has been successfully completed
8 it no longer overhangs him, but as long as his
9 term of probation continued that unexecuted
10 sentence overhung him.

11 Now, had it come into execution by reason
12 by his being in violation of his probation,
13 and having been convicted of the violation, the
14 sentence would have gone into effect at once
15 unless reduced, and he would then have been
16 entitled to a credit against it for all the time
17 spent in prison, that is the 1,170, so that his
18 actual commitment time would have been such that
19 he would be at the point, practically, of parole
20 eligible the minute the sentence came into
21 execution, and in that sense the 1170 days are
22 not wasted time.

23 Now, the other consideration that I think
24 bears on this is not a technical one but derives
25 from the sentencing which was a prison sentence

1
2 not imposed on him. He was the one who, accord-
3 ing to the evidence, if believed, and the jury
4 evidently believes material parts of it, at least
5 enough to convict him, he was the one who both
6 had been responsible for the custody of the
7 revolver used, allegedly used in the hijacking
8 and who under the planning on the night of
9 July 27-28, 1959, went to the tenement house and
10 retrieved the pistol from behind the radiator
11 at Mr. Persico's direction, according to
12 Mr. Vaccaro's testimony, and took it with him
13 on the hijack, and the evidence was that a
14 pistol was presented to Mr. Kennedy, the truck
15 driver, when the Buick stopped the truck and
16 he was removed from the truck by Mr. Albanese
17 and Mr. Vaccaro and had been ridden around town
18 for some time while Spero drove the truck away.
19 So that was hardly a peripheral connection with
20 it.

21 Mr. McIntosh received a nine-year sentence,
22 which is apparently going to be adjusted later
23 in the day, somehow, and I think probably that
24 it would be difficult, strictly in terms of
25 sentencing, to justify a lighter sentence for

1
2 Mr. Albanese. Now, in imposing the 10-year
3 sentence, the 10 years was, of course, to a
4 certain extent, and as a rule, well, sentence
5 was intended to simplify Mr. Albanese's problem
6 by giving him an enormous incentive to avoid
7 violation of probation. It, I think, is fair
8 to say, had a little extra in it, but very
9 little extra, I wanted it to be a rounded amount
10 but something where if anybody ever said to him,
11 "Come on, you can go along with this, this is
12 pretty safe," he would say, "Look, I have got
13 10 years hanging over my head; forget it." And
14 that is much easier to say than if it were 9
15 years or 8 years or 7 -- or 11 -- "I have 10 years
16 hanging over my head," et cetera. That was
17 intended to be his rule of life for the next
18 five years, and by that time I figured at least
19 his age, he had a wife and I think one or two
20 children, he ought to be in the clear and ready
21 to get to work.

22 At the time of sentencing he was still
23 a big, strong-looking person, although the last
24 time he saw him he looked awful.

25 Now, the reason sentence was suspended

1
2 and he did not receive any term of imprisonment,
3 as distinguished from McIntosh, who did, and
4 from Mr. Persico, who did, was that he had spent
5 so much time in prison already on this and other
6 counts that everything the prison could do for
7 him had at least in theory been done, and while
8 he had not been at liberty throughout, he had
9 been at liberty for some considerable time --
10 I can't be sure now, I think he had been at
11 liberty for some years, if I am not mistaken --
12 I am not too clear about that, time in the
13 Persico case comes in such large gobs that you
14 can't be sure.

15 For that reason, it seemed to me that the
16 idea of throwing him back to jail for this
17 ancient offense was not indicated, nor was it
18 indicated in the Spero case, he had done a long
19 time in State Prison, perhaps some in Federal
20 custody, but principally a long time in State
21 Prison. It was just recently that he had been
22 admitted to parole and was going to be subject
23 to state parole supervision for another decade.

24 In his case, too, he was given a 10-year
25 suspended sentence and placed on probation for

1
2 the maximum probationary term. The thinking was
3 that while Albanese had not done nearly so much
4 time as Spero, he had done enough for sentencing
5 purposes and could be treated on the same basis
6 as Spero, to a degree.

7 Incarceration for Spero would have been
8 simply inhumane, he had done so much time since
9 1959, and I am quite uncertain as to when he
10 committed the offense which resulted in his State
11 imprisonment, but that was an ancient offense,
12 too. So that was the thinking, in other words,
13 the time spent in prison was very much taken
14 into account in the shaping of the sentence.

15 (Continued on next page.)
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EX: ss
Reel 2

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2 THE COURT: From these points of view,
3 the inevitable conclusion today would be that
4 he was not entitled, is not entitled to a credit
5 against probation time unless the law mandates
6 it because that would be wholly alien to the idea
7 of the sentence.

8 Now as to whether the law mandates it, my
9 conclusion on that would be that it definitely
10 does not, that the language and structure of Section
11 3651 and 3568 are rather indicative that prison
12 time for purposes of credit is radically dis-
13 tinguished from time on probation. The abridge-
14 ment of probation time is possible under the law,
15 I believe --

16 MR. WALES: I think under 3653 it is, your
17 Honor.

18 THE COURT: I am reasonably sure it is.

19 MR. WALES: The first paragraph of 3653,
20 the Court can discharge a probationer at any time.

21 THE COURT: Section 3653 provides that when
22 directed by the Court, "the probation officer shall
23 report to the Court with a statement of the con-
24 duct of the probationer while on probation. The
25 Court may thereupon discharge the probationer from

2

further supervision and may terminate the probation against him, or may extend the probation, as shall seem advisable."

The practice in this district, at least, is that the County Court rarely does that on some motion, but it is not uncommon for the probation service to submit a report and suggest early termination of probation, but it is on its own motion.

So without further instruction, I would conclude that the motion must be denied.

I am sure it is appealable.

MR. WALES: Before I get to the appeals stage, perhaps I can convince you of one or two things:

I don't doubt, I don't quarrel with your Honor for a minute in the terms of your thinking process of how you today now relate what you did and why you did it --

THE COURT: I should say by the way that these were enormously difficult sentences, as you can imagine from the background of the case and the fact that this was the third time the man had been sentenced.

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3 MR. WALES: I don't quarrel with your re-
4 lating to me right now, your Honor, what went
5 through your mind now, let us say, and in terms,
6 in terms of doing what you did in this area, but
7 I don't think that this is the end of the matter,
8 perhaps it is the beginning of the matter, the
9 end is: What does the record reveal, and I don't
10 think the record reveals, your Honor, that your
11 Honor took any of these things into consideration;
12 perhaps they went on in the back of your mind when
13 you imposed sentence upon Albanese that day, but
14 I think the record is silent on that score, and
15 I think that this application today has to be deter-
16 mined solely upon the record as if your Honor had
17 no independent recollection of it: You have to
18 read the record. If the record shows that you
19 took that matter into consideration and you gave
20 him credit for it or were you asked for credit
21 by the section, then that would be one thing --

22 THE COURT: I think there is one thing
23 you leave out of you and that is that under Rule
24 35 there was a pre-sentence report available for
25 inspection, so that the pre-sentence report is
also a part of this --

1
2 MR. WALES: Only to the extent --

3 THE COURT: (Continuing) and there is also,
4 as you know, a recommendation from the probation
5 office, my tentative sentence and the recommenda-
6 tions of the panel list, so that the record has
7 both its transcript visibility and its submerged
8 portions -- perhaps in total fairness to every-
9 body concerned I ought to get that.

10 Do you want to do that.

11 MR. WALES: Well, no, your Honor, and it is
12 not that I don't want to accept your offer, but I
13 really feel --

14 THE COURT: I am just thinking in terms --
15 well, I mean this can be a point of some interest
16 to the appellate court.

17 MR. WALES: The point is that, your Honor,
18 that I am not really interested, your Honor, and
19 not because of lack of disrespect, but I don't
20 think it is germane or material as to what the
21 probation officer's report said or what the
22 recommendation was or what members of his staff,
23 what is germane and the only thing that is germane
24 is what is there in the record at the time sen-
25 tencing was imposed --

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2 THE COURT: Just that is my point that be-
3 cause of the language --

4 MR. WALES: I think it is Rule 32.

5 THE COURT: Rule 32?

6 MR. WALES: Which gives pre-sentence re-
7 ports.

8 THE COURT: Rule 32(c), it is because of
9 that that it isn't really possible to say that
10 the record is limited to the transcript because,
11 well, in 1969 so many lawyers started out by
12 saying, I know you have a full and adequate pre-
13 sentence report before you, only nowadays about
14 half of the time they say, I know that you have
15 a very full tendentious and inaccurate pre-sentence
16 report before you, and they take specific exception
17 to the assertions on page so and so, line so and
18 so, et cetera, and that is under Rule 32(c), par-
19 ticularly Subdivision 2. The pre-sentence report
20 is really part of the record.

21 MR. WALES: It is only to the extent of
22 course that it is part of your Honor's thinking,
23 obviously you have studied it and been guided by
24 it.

25 THE COURT: The other thing that I have in

1
2 mind is that it is important I think whether the
3 sentence imposed was inadvertent or advertent,
4 and what I would suggest here is, as you can
5 well imagine, that the sentences in this sort of
6 thing were advertent sentences and not routine
7 by any manner or means. The cases were fairly
8 well known by that time.

9 MR. WALES: Let me state my position on
10 that point:

11 My position would be that your Honor has
12 the opportunity to read into the record such por-
13 tions of the probation report as you wish and
14 announce as being guidelines for the imposition
15 of your sentence, so I say that when it comes to
16 reviewing, let us say, the affect of a sentence
17 in terms of whether a man gets certain credit or
18 doesn't get certain credits by the reason of the
19 operation of other statutes, that we have to
20 look to the record that was made, and after all,
21 the only way the law can really be guided is in
22 terms of records that are being made. Now ob-
23 viously a defendant counsel has an opportunity to
24 make statements, defendants also, if they wish,
25 and when the Court imposes sentence it can, to the

1 7
2 extent it wishes, make reference to things which
3 are in the probation report and which has guided
4 him, and he can make reference to facts. Maybe
5 there is something in the report which they reject,
6 they don't wish to be guided by or they dismiss as
7 being frivolous. But the Court can state exactly
8 what motivates it to do what it does so it may be-
9 come known and dealt with by the Justice Depart-
10 ment or by another Judge or by the Court of Appeals.
11 Certainly back in 1969 even perhaps we didn't have
12 so much disclosure in pre-sentence reports to de-
13 fendants' counsel as we have now, but there was
14 nothing to stop any District Judge from reading
15 a portion of it into the record and to say, I --

16 THE COURT: I agree with your theory, I
17 think decency and human consideration is a real
18 reason for that, I never regard sentence as an
19 occasion for some Pontius Pilate on the bench
20 excoriate someone as a justification for wrapping
21 him up for X years, the whole business of reciting
22 the man's record in open Court even strips a man
23 of his manlihood and decency and certainly not
24 any part of the administration of justice. It
25 was sort of disgusting and repellant to most people

brought up in Brooklyn having to read Judge Liebowitz's repeated denigration of people in Court, that is if they had any humanity in them.

MR. WALES: Of course here your Honor had the opportunity to do the opposite and to say --

THE COURT: I have to be consistent.

MR. WALES: What.

THE COURT: I have to be consistent.

MR. WALES: You could have said, I'm giving him credit because I'm taking into consideration certain things. As I say, your Honor has the right and the power and the opportunity to read into the record that which you wish to read into the record or to state what you did and why you did it.

THE COURT: That is right, and there is certainly intimation in recent Court of Appeals' cases, they said that in all of these things done, no matter what it is, decency calls for certain things.

MR. WALES: But your Honor did not do it in this case.

THE COURT: No.

MR. WALES: I am not going to quarrel with

9

1 your policy, but I suggest this to your Honor
2 now that in determining whether Albanese has any
3 rights under any of this statute for purpose of
4 credit that all we can really look to is the
5 record: I don't think it is for us to go back
6 to the District Court and have to interview the
7 Judge or question him informally to find out what
8 motivated him or what his recollections are as of
9 that time. I think the only proper way, as lawyers,
10 that we can do it is to go to the record and see
11 what the record says, for better or for worse.
12 If the record shows that credit was given and that
13 either lip service or full effect was given to
14 that Section 3568, then that is fine, that is
15 one thing; on the other hand, if the record is
16 silent, then I say that the section should take
17 effect. I think at this point, while I respect
18 your Honor's thinking and recollection of your
19 thinking, I think that the only proper practice
20 and the germane way is to say, What does the re-
21 cord say, and I think the record is silent at this
22 point, and if it is silent, then I would suggest
23 that the defendant is entitled to credit, if his
24 sentence is one of custody and I say one for which
25

10

1 Congress had in mind when they drafted this
2 particular section.
3

4 So I think --

5 THE COURT: I see your point --

6 MR. WALES: -- I think we are really before
7 you on two points:

8 Number 1 is does sentence of probation
9 warrant it, or is the section ever applicable to
10 sentence of probation and applicable say to
11 sentence of imprisonment, which is as I see the
12 issue. Your Honor on the other hand says, We have
13 got to take into consideration what went on in the
14 back of my mind when I did what I did.

15 THE COURT: No, I put that forward simply
16 to show, as I say, that sentence was not inadvertent.

17 MR. WALES: I'm sure everything your Honor
18 does is not inadvertent. I have too much respect
19 for your Honor to believe that any of these things,
20 especially sentencing where you are giving it con-
21 sideration, obviously that is not going to be in-
22 advertent.

23 I say the record doesn't substantiate --
24 let us put it this way, the record does not repute
25 the position which I am advancing today, and I

11

1 think that I am entitled to have that issue re-
2 solved on the basis of the record and not some-
3 thing outside of the record.
4

5 THE COURT: Well, as I say, I don't accept
6 that it is outside of the record.

7 MR. DOUGHERTY: My only comment, your
8 Honor, and I will be frank to admit that on a
9 brief and first reading of some of these sections
10 that I have to express unfamiliarity with them,
11 but if I understand Mr. Wales' position he seems
12 to be reading into Section 3651 the requirement
13 that the section does not mandate, namely that
14 upon considering whether or not the public in-
15 terest will be served and the ends of justice
16 will be served by tracing a defendant on proba-
17 tion, the Court is also required to state with
18 specificity the reason why it feels such a sen-
19 tence serves the interests of justice and the
20 public interest, and I don't think that Section
21 3651 places that burden upon a sentencing Court
22 to do.

23 THE COURT: Well, it seems to me, Mr.
24 Wales, the critical defect in your argument would
25 be that it would absolutely mandate an abridged

1 12 37a 27
2 probation in every case in which the Court wished
3 to have the defendant admitted to probation, largely
4 in consideration of time served.

5 MR. WALES: You could have avoided that
6 problem.

7 THE COURT: What.

8 MR. WALES: You could have avoided that
9 problem, and that is where he had to be sentenced
10 on two counts you gave him concurrent sentences on
11 both counts, in other words if you had given him
12 a prison sentence of let us say three and a half
13 years on the first count, let it stay, and given
14 him probation on the second count, then it wouldn't
15 have been a problem --

16 THE COURT: But that was an adventitious
17 circumstance of the specific case and not a general
18 case with which the statutes have to deal. In
19 other words what this comes down to is saying that
20 maximum probation could not be imposed in any case
21 in which the defendant had been held on a charge
22 of which he is sentenced for any length of time
23 for want of bail the Court would always have to
24 impose a prison sentence to mop up that time, and
25 having done so, would have exhausted its power to

13

1 grant probation.

2 MR. WALES: In a split sentence.

3 THE COURT: What.

4 MR. WALES: In a split sentence, that would
5 solve that problem.

6 THE COURT: Well, no, it wouldn't, specific-
7 ally it could solve only those cases in which the
8 existing incarceration had not extended beyond
9 six months.

10 MR. WALES: Well, of course, this statute
11 has a limiting affect, if a District Judge wants
12 to impose a maximum prison sentence, if he really
13 feels that the defendant is entitled to a maximum
14 prison sentence, he has this limiting factor there,
15 too, but if the fellow has enough time in he is
16 going to walk right out and there is nothing that
17 the Judge can do about it. I think the same
18 argument goes for probation as it goes for prison
19 sentence.

20 THE COURT: Well, I dissent for the reason
21 stated.

22 The motion is denied.

23 I will make an order on it so you can --

24 MR. WALES: Is it possible, your Honor,
25

14

could your Honor write a little opinion, two,
three sentences, maybe.

We are going to the Court of Appeals.

THE COURT: I think what we have done here
is short and clear enough, it expresses my views
fully and clearly.

There are no cases directly in point, so
that Court will have to go to work.

MR. WALLS: Thank you, your Honor.

* * * *

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

ALBANESE,

Petitioner-Appellant,

against

Affidavit of Service by Mail

U.S.A.,

Appellee,

STATE OF NEW YORK, COUNTY OF NEW YORK

SS.:

I, LAUREL N. HUGGINS,

being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1050 CARROLL PL., BNX, N.Y.

That upon the 28th day of March 1974, deponent served the annexed Appellant's

Appendix upon U.S. Attorney-~~Southern~~ Eastern District attorney(s) for
 Appellee in this action, at 225 Cadman Plaza, Brooklyn, N.Y.

the address designated by said attorney(s) for that
 purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a
 Post Office Official Depository under the exclusive care and custody of the United States Post Of-
 fice Department, within the State of New York.

Sworn to before me, this 28th
 day of March 1974 March

Laurel N. Huggins

 Print name beneath signature

LAUREL N. HUGGINS

ROBERT T. BRIN

NOTARY PUBLIC, STATE OF NEW YORK

NO. 31 - 0418950

QUALIFIED IN NEW YORK COUNTY

COMMISSION EXPIRES MARCH 30, 1975

